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Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-347

PHILLIPS PETROLEUM COMPANY,
a Corporation
Petitioner

VS.

TEXACO INC., a Corporation
Respondent

BRIEF IN OPPOSITION OF RESPONDENT TEXACO INC.

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OPINIONS BELOW

The District Court made an order holding that the District Court was without jurisdiction of the subject matter. The order has not been published, but is reproduced as Appendix A to the Petition for Writ of Certiorari.

The United States Court of Appeals for the Tenth Circuit reversed the order of dismissal by the District Court. The Opinion of the Court of Appeals has not yet been published, but it is quoted verbatim at pages 13 to 17 of this brief and is reproduced as Appendix B to the Petition for Writ of Certiorari pages A5-A10. A dissenting opinion by a judge of the Court of Appeals is reproduced at pages A11-A14 of the Petition for Writ of Certiorari.

JURISDICTION

The Petition for Writ of Certiorari involves Title 28 U.S.C., § 1254(1), 62 Stat. 928. Respondent urges that no special and important reason exists, and indeed, no reason exists, for a review by this Court of the judgment of the United States Court of Appeals, Tenth Circuit, holding that Respondent's claim against Petitioner arises under the laws of the United States so that the federal courts have jurisdiction under Title 28, U.S.C., § 1331(a). Rule 19, Rules of the Supreme Court of the United States.

QUESTION PRESENTED

It is our opinion that the questions presented at pages 2 and 3 of the Petition for Writ of Certiorari do not accurately state the question which is before this Court in connection with said Petition. The question presented is:

Where the operative effect of federal statues (§ 11 of the Helium Act Amendments of 1960, 50 U.S.C., § 167i, and §§ 4 and 5 of the Natural Gas Act, 15 U.S.C., §§ 717c and 717d) creates a right in plaintiff to be paid for valuable helium extracted by defendant from natural gas which defendant secures from plaintiff by paying only the Federal Power Commission service rate, does the U. S. District Court have jurisdiction of plaintiff's claim against defendant under Title 28, U.S.C., § 1331(a) where the requisite amount is involved, and where the right is such that it will stand or fall on the construction or effect of such statutes?

STATUTES INVOLVED

The statutes involved in this controversy are:

Title 28 U.S.C., § 1331(a) which is as follows:

> "(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States."

Title 15 U.S.C., §§717 through 717w. Set forth in Appendix D, pages A15-A18 of the Petition for Writ of Certiorari are the significant parts, Secs. 717c and 717d.

Section 11 of the Helium Act Amendments of 1960, 50 U.S.C., § 167i which is as follows:

> "The provisions of the Natural Gas Act of June 21, 1938, as amended, shall not be applicable to

the sale, extraction, processing, transportation, or storage of helium either prior to or subsequent to the separation of such helium from the natural gas with which it is commingled, whether or not the provisions of such Act apply to such natural gas, and in determining the rates of a natural gas company under sections 717c and 717d of Title 15, whenever helium is extracted from helium-bearing natural gas, there shall be excluded (1) all income received from the sale of helium; (2) all direct costs incurred in the extraction, processing, compression, transportation or storage of helium; and (3) that portion of joint costs of exploration, production, gathering, extraction, processing, compression, transportation or storage divided and allocated to helium on a volumetric basis."

STATEMENT OF THE CASE

Texaco, and the Petitioner, Phillips Petroleum Company, are producers of oil and gas and own and operate gas wells in the Hugoton Gas Pool which is located in Southwestern Kansas and in the Oklahoma and Texas Panhandles. It is the largest interconnected gas reservoir in the world and contains 3,300 square miles. Ninety-nine percent of the helium reserves of the United States are in this pool, entrained in the gas.

The basis of the rights of the parties hereto to own and operate the gas wells involved are oil and gas leases generally on a regular form or Producers 88 type of oil and gas lease executed by the

owners of minerals of the lands in the Hugoton Gas Pool Area.

In addition to its activities as a lessee-producer in the Hugoton Gas Pool, Phillips is a purchaser of gas and is the owner and operator of two helium extraction plants located in the Texas Panhandle where it extracts the helium which is entrained in the natural gas, and sells it to the U. S. Government.

Texaco produces and sells gas in the Hugoton Gas Pool to Phillips. Phillips takes the gas from the Texaco wells and conveys it by pipeline to its helium extraction plants and extracts the helium from said gas. The helium has a substantial value. Following the extraction of the helium the gas taken from the Texaco wells continues to move in interstate commerce to markets in Northern and Eastern parts of the United States. The gas which Texaco sells to Phillips is subject to the jurisdiction of the Federal Power Commission, T. 15 U.S.C., Secs. 717 through 717w. Phillips first started helium extracting operations in 1963 and has continuously since that time extracted helium from the gas which it buys from Texaco. Phillips has received substantial sums of money from the sale of the helium which it has extracted from the Texaco gas. Phillips has obtained the helium from Texaco, but has paid Texaco only the service rate fixed by the Federal

Power Commission for the gas. The Federal Power Commission rate does not cover or include the helium. Sec. 11 of Helium Act Amendments of 1960, 50 U.S.C. Sec. 167i. There are other purchasers of natural gas and other lessee-producers in the Hugoton Gas Pool.

In 1963 there were instituted eight separate actions in the Federal District Court for the District of Kansas which involved the identical basic issue as that presented in the instant case, namely whether the landowners and lessee-producers are entitled to receive benefit from the value of the helium recovered from their lands and leases. These cases were consolidated. We quote from the opinion of the Court of Appeals in the *Consolidated Helium Cases, Northern Natural Gas Company vs. Grounds,* 441 F.2d 704, (cert. den. 404 U.S. 951, 1063, 1065) at page 707:

> "Six of the eight actions which were consolidated for trial are in the nature of interpleader. The fund in each suit is the money paid and to be paid by the United States to the interpleading plaintiffs for the helium-gas mixture produced and sold by them. Four of the cases were brought by Cities Service Gas Company, a pipeline. One was brought by Northern Natural Gas Company, a pipeline, and its subsidiary Northern Helex Company. In each of these five cases the defendants are named landowners and named lessee-producers in each instance as representatives of a class. The sixth interpleader was brought by National Helium Corporation which is owned in

equal shares by Panhandle Eastern Pipe Line Company and National Chemical and Distillers Company. The defendants are Panhandle Eastern and named landowners as representatives of a class. Pursuant to a third-party complaint by Panhandle Eastern, named lessee-producers were brought in as representatives of a class. Motions to dismiss the interpleaders on jurisdictional grounds were denied by the trial court and we affirmed. Grounds v. Northern Natural Gas Company, 10 Cir., 327 F.2d 1003.

"The remaining two actions were brought by named landowners, as representatives of their class, against the United States. One is under the Federal Tort Claims Act, see 28 U.S.C. §§ 1346(b), 1402 and 2674, on the theory of conversion, and the other under the Tucker Act, see 28 U.S.C. § 1346(a)(2), on the theory of reverse condemnation.

"All eight actions were maintained in the district court as class actions under Rule 23, F.R. Civ.P. One class is the landowners and the other is the lessee-producers. The district court held that the actions were properly maintainable as class actions. See 292 F.Supp. 619, 633-637. On these appeals no question is raised as to the propriety of the district court treatment of the cases as class actions."

The Court of Appeals concluded that:

"In our opinion, private contract law and the principles applicable thereto are not controlling." (441 F.2d at page 722);

and it further stated that:

"* * * Two results are possible. The first is that the lessee-producers must deliver the gas at the FPC service rate, based on fuel value, and receive nothing for the helium value. This produces a windfall for the pipelines and their Helex subsidiaries. The second is that the lessee-producers are entitled to the reasonable value of the contained helium. This means that the landowners will receive royalties on the value of the helium produced from their lands and the lessee-producers will receive value for the helium content of the natural gas which has been produced by their efforts. *We believe that satisfactory utility regulation requires the second result. Otherwise, a utility rate may be used to obtain a commodity or service which is not within the contemplation of that rate.*" (emphasis supplied) (441 F.2d pp. 722-723.)

Texaco instituted the instant case in the District Court for the Northern District of Oklahoma claiming the right to be compensated for the value of helium entrained in gas delivered to Phillips which Phillips obtained by paying only the Federal Power Commission service rate. The trial court held that it was without jurisdiction. In reversing, the Court of Appeals announced:

"We adhere to our decision in Consolidated Helium. Absent circumstances not present there or disclosed on the record now before us, recovery of the value of helium separated from gas moving interstate can be had only by reconciliation and application of the Natural Gas Act and the 1960 amendments to the Helium Act, not under contract

law or principles of equity. We reject defendant's assertion that Consolidated Helium was an interim decision. The Supreme Court denied certiorari, 404 U.S. 951, 1063 and 1065. The decision is final and is the law of this circuit. We say nothing on plaintiff's claim that Consolidated Helium is res judicata on the issues presented here. We are concerned with jurisdiction, not with the merits." (Petition for Writ of Certiorari, p. A9)

ARGUMENT

Insofar as the jurisdictional question before this Court is concerned, the principles are identical to those involved in the *Consolidated Helium Cases*, supra, and admittedly, the issue was finally resolved by the Court of Appeals in favor of the position urged by Texaco here. This Court denied certiorari, 505 U.S. 951, 1063, 1065, and that decision is final.

Phillips Petroleum Company was joined by the United States as a third party defendant in the landowners' tort claims and Tucker Act suits. Phillips was also made a party as a lessee-producer in two of the interpleader actions, but disclaimed any interest in the funds and elected not to be bound by the judgment as a member of the lessee-producer class. See *Northern Natural Gas Company vs. Grounds*, 292 F. Supp. 619. Its protest here that it is being subjected to the burden of additional litigation comes with poor grace from one who rejected the opportunity to

have all claims against it resolved in the class action *Consolidated Helium Cases,* supra. More to the point, Petitioner's argument that the federal courts will be subjected to an indeterminate number of lawsuits if the Court of Appeals' decision is allowed to stand, is not well taken. In the instant case, the final result in the *Consolidated Helium Cases,* supra, will bind all members of the classes of litigants represented except those who specifically elected to be excluded. Further, the opinion of the Court of Appeals in the case before the Court does not extend long recognized jurisdictional guidelines. The Court of Appeals, in no uncertain terms, rejected the contention that private contract law and principles of equity were the basis of Texaco's claim and concluded:

> "The problems relating to the recovery of the value of the helium content of natural gas traveling in interstate commerce have arisen because of, and under, federal statutes. Plaintiff asserts rights under those statutes and is entitled to sue in federal court. We believe that the federal courts have jurisdiction under 28 U.S.C. §1331(a)." (Petition for Writ of Certiorari herein p. A10)

It will be recalled that, in the *Consolidated Helium Cases,* supra, the trial court held that the lessee-producers (including Texaco) were not entitled to recover the value of the helium contained in the gas sold to the gas purchasers under the terms of their contracts, and that payments received under those contracts by the

lessee-producers from their pipe line purchasers constituted full payment for the entire gas stream; that Section 11 of the 1960 Helium Act Amendments did not abrogate those contracts insofar as sale of the helium is concerned; that the payments for the gas so received were not rendered illegal or insufficient as payment for helium because payments were made at rates regulated and approved by the Federal Power Commission; and that lessee-producers were entitled to no recovery on any theory of unjust enrichment; see *Northern Natural Gas Company vs. Grounds*, 292 F.Supp. 619, at pages 686 and 687. The Court of Appeals, as above pointed out, held that private contract law and principles applicable thereto were not controlling; that where the trial court fell into error was in reading the Natural Gas Act and the Helium Act Amendments separately and treating the two as disassociated, isolated provisions, having only the effect of limiting the price of natural gas and exempting helium from Federal Power Commission regulation. The Court of Appeals went on to say that, under these two Federal Acts:

> "We believe that satisfactory utility regulation requires the second result." (i.e., that lessee-producers be paid for the helium content); 441 F.2d at page 723.

Texaco has a cause of action against Petitioner, under the existing facts, because the Court of Appeals

has held that, under a practically identical set of facts, a lessee-producer is entitled to recover for the value of the helium and that holding has become final. This cause of action must, of necessity, be based upon and arise under the federal statutes involved because that is what the Court of Appeals has held and that holding has become final.

Petitioner errs in saying that Texaco's complaint merely anticipates a defense of payment upon the part of Petitioner. The claim asserted by Texaco arises from, and is directly and completely based on, the operative effect of the federal statutes involved. Without these statutes, Texaco has no claim. It is certain that Texaco's claim is not predicated on contract or principles of equity, nor dependent on any state or local law. Texaco's claim accordingly does not plead against an anticipated defense. The cases cited by Petitioner are totally inapplicable and irrelevant.

The Tenth Circuit Court of Appeals, in the instant case, has not enlarged the jurisdiction of the district courts. It has merely held that, under the state of facts presented, if Texaco has a claim, that claim arises under the laws of the United States and not under contract law or principles of equity.

The opinion of the Court of Appeals in this case (Appendix B, pp. A5-A10) itself answers each of the contentions made by Petitioner in the Petition for Writ

of Certiorari. It is not long and we quote from it as follows:

> "The question is whether the complaint of plaintiff-appellant Texaco Inc. states a controversy arising under the laws of the United States. If it does, federal court jurisdiction lies under 28 U.S.C. § 1331(a). Otherwise, there is no federal jurisdiction. The district court sustained the motion to dismiss of defendant-appellee Phillips Petroleum Company and dismissed the action on the ground that there was no federal question jurisdiction. We reverse.
>
> "We have here another controversy over helium. The basic background is outlined in our decision in the Consolidated Helium cases. See Northern Natural Gas Company v. Grounds, 10 Cir., 441 F.2d 704, cert. denied 404 U.S. 951, 1063, and 1065. We there held that lessee-producers of natural gas could recover the reasonable value of contained helium out of interpleader funds created by the government's purchases of helium from helium extraction companies and parent pipeline companies. In Consolidated Helium, federal jurisdiction was invoked under the Federal Interpleader Act, 28 U.S.C. § 1335, the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 1402, and 2674, and the Tucker Act, 28 U.S.C. § 1346(a)(2). None of those jurisdictional grounds are found in the case at bar.
>
> "Diversity of citizenship is not present. More than the jurisdictional amount is admittedly at stake. The only basis for federal jurisdiction is 28 U.S.C. § 1331(a) which confers jurisdiction when "the matter in controversy * * * arises under the * * * laws * * * of the United States." Phillips says that the complaint presents no more than a

simple, common law, contract action and does not pertain to any right or immunity created by any law of the United States.

"The complaint alleges that plaintiff, a lessee-producer, and defendant are natural gas companies within the scope of the Natural Gas Act; that plaintiff has made written contracts to sell gas to defendant for movement in interstate commerce; that for several years defendant has separated out the helium content of the gas and sold it; that defendant has not paid plaintiff for the helium contained in, and separated from, the gas; and that plaintiff has a right under the Natural Gas Act, 15 U.S.C. § 717 et seq., and under § 11 of the Helium Act amendments, 50 U.S.C. § 167i, to be paid for the helium.

"It is said in Wright, Fed. Courts 2d H.B., p. 55, that no "clear test has yet been developed to determine which cases 'arise under' the Constitution, laws, or treaties of the United States." The leading case on the subject is Gully v. First National Bank, 299 U.S. 109. The Court recognized these tests, Ibid. at 112-113: (1) a right or immunity created by the Constitution or laws of the United States must be an essential element of plaintiff's cause of action; (2) the right or immunity must be such as will stand or fall on the construction or effect of the federal Constitution or laws; (3) the controversy must be genuine and present; and (4) the controversy must be disclosed on the face of the complaint, unaided by the answer or the petition for removal.

"We have recognized and applied the Gully tests in Regents of New Mexico v. Albuquerque Broad-

casting Co., 10 Cir., 158 F.2d 900 (jurisdiction upheld in suit asserting rights under Communications Act of 1934 and regulations issued thereunder); Prairie Band of Pottawatomie Tribe of Indians v. Puckkee, 10 Cir., 321 F.2d 767 (jurisdiction denied in suit for declaration of rights in congressionally appropriated funds for payment of money judgment of the Indian Claims Commission); and Midwestern Developments, Inc. v. City of Tulsa, Oklahoma, 10 Cir., 333 F.2d 1009, cert. denied 379 U.S. 989 (jurisdiction upheld in suit relating to right of way granted under the Enid-Anadarko Act). In Mountain Fuel Supply Company v. Smith, 10 Cir., 471 F.2d 594, a suit involving rights under land patents granted pursuant to the Act of July 17, 1914, we upheld jurisdiction without discussion of Gully.

"In Consolidated Helium we considered the claims of the pipelines and helium separation companies that they were entitled under their gas purchase contracts to receive the entire gas stream at the Federal Power Commission service rate and said that "private contract law and the principles applicable therto are not controlling." 441 F.2d at 722. No good purpose would be served by repeating our analysis of the Natural Gas Act and the 1960 Helium Act amendments. We held that, Ibid. at 723:

> "* * * the reconciliation of the Natural Gas Act and of the 1960 amendments to the Helium Act to attain a symmetrical whole requires the conclusion that the FPC service rates do not apply to deny recovery for the contained helium which is processed in the separation plants.'

"In holding that it has no jurisdiction, the trial court said that the judgment in Consolidated Helium does not raise a federal question which will support jurisdiction under § 1331(a). We agree that the judgment will not itself support that jurisdiction. See Metcalf v. Watertown, 128 U.S. 586, 588, and Prairie Band of Pottawatomie Tribe of Indians v. Puckkee, 10 Cir., 321 F.2d 767, 770.

"The trial court went on to say that the Natural Gas Act did not abrogate the contracts and that neither that Act nor the 1960 Helium Act amendments created any right in the plaintiff. In Consolidated Helium we recognized that the Natural Gas Act did not abrogate private rate contracts as such, 441 F.2d at 720, and pointed out that price and other provisions of contracts for the interstate sale of natural gas have largely been nullified by Federal Power Commission regulations and orders. The trial court construed our decision in Consolidated Helium as permitting recovery by lessee-producers "on principles of equity by a reconciliation of federal statutes which did not abrogate existing gas contracts." We thought that we made plain that we did not allow recovery on the application of any principles of equity, see 441 F.2d at 719-720, but on the ground that satisfactory utility regulation does not permit a utility rate to be used to obtain a commodity which is not within the contemplation of that rate. 441 F.2d at 720 and 722-723.

"We adhere to our decision in Consolidated Helium. Absent circumstances not present there or disclosed on the record now before us, recovery of value of helium separated from gas moving

interstate can be had only by reconciliation and application of the Natural Gas Act and the 1960 amendments to the Helium Act, not under contract law or principles of equity. We reject defendant's assertion that Consolidated Helium was an interim decision. The Supreme Court denied certiorari, 404 U.S. 951, 1063, and 1065. The decision is final and is the law of this circuit. We say nothing on plaintiff's claim that Consolidated Helium is res judicata on the issues presented here. We are concerned with jurisdiction, not with the merits.

"We have here a genuine and present controversy disclosed on the face of the complaint and not asserted in anticipation of any defense. Plaintiff presents a substantial claim resting on a reasonable foundation. The right asserted under federal laws is an essential element of plaintiff's case which must stand or fall on the construction or effect of the federal laws. The tests announced in Gully have all been met.

"One further matter should be mentioned. In Consolidated Helium we pointed out that there are over 30,000 persons receiving income from helium-bearing natural gas produced by over 500 lessee-producers under thousands of leases. 441 F.2d 710 and 715. The Supreme Court said in Gully, 299 U.S. at 117:

> 'This Court has had occasion to point out how futile is the attempt to define a 'cause of action' without reference to the context. * * * To define broadly and in the abstract 'a case arising under the Constitution or laws of the United States' has hazards of a kindred order. What is needed is something of that common-sense accommoda-

tion of judgment to kaleidoscopic situations which characterizes the law in its treatment of problems of causation. One could carry the search for causes backward, almost without end.'

"The problems relating to the recovery of the value of the helium content of natural gas traveling in interstate commerce have arisen because of, and under, federal statutes. Plaintiff asserts rights under those statutes and is entitled to sue in federal court. We believe that the federal courts have jurisdiction under 28 U.S.C. § 1331(a).

"The judgment is reversed and the case remanded for further proceedings."

In summary:

The Petition for Writ of Certiorari does not present a case where a special or important reason exists for the issuance of such a writ. Rule 19, Rules of the Supreme Court of the United States.

The controversy at bar involves a local matter. There is no expansion of federal jurisdiction involved.

The inference made in the Petition for a Writ of Certiorari that there would be many claims of similar nature filed in the federal courts is (although only one case is cited) not borne out by the record. In fact, almost all claims of similar nature have already been adjudicated in the class action, *Consolidated Helium Cases,* supra. Moreover, Petitioners' own liability to pay for helium it extracts and sells has for all practical purposes already been determined by those cases.

It is well established that where a claim of the requisite amount is created by the operative effect of federal statutes and the right is such that it will stand or fall on the construction or effect of such statutes, federal court jurisdiction is present. *Gully vs. First National Bank of Meridian*, 299 U.S. 109 (1936); *Regents of New Mexico vs. Albuquerque Broadcasting Co.*, 10 Cir., 158 F.2d 900; *Prairie Band of Pottawatomie Tribe of Indians vs. Puckkee*, 10 Cir., 321 F.2d 767; *Midwestern Developments, Inc. vs. City of Tulsa, Oklahoma*, 10 Cir., 333 F.2d 1009, cert. den. 379 U.S. 989; *Mountain Fuel Supply Company vs. Smith*, 10 Cir., 471 F.2d 594. See also *International Association of Machinists, AFL-CIO, et al., vs. Central Airlines, Inc.*, 372 U.S. 682, 10 L.ed 2d 67, 83 S.Ct. 956, reh.den. 373 U.S. 947, 10 L.ed 2d 702, 83 S.Ct. 1533.

CONCLUSION

Respondent respectfully submits that no writ of certiorari should issue herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 19 day of September, 1973, three (3) copies of the foregoing Brief in Opposition of Respondent, Texaco, Inc., were mailed, properly addressed, first class postage prepaid to Mr. Richard B. McDermott, 1300 National Bank of Tulsa Building, Tulsa, Oklahoma 74103, attorney of record for Petitioner, Phillips Petroleum Company.

I further certify that all parties required to be served have been served.

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